Supreme Court, U.S.
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No. 94-1015

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DANIEL G. GELLERT,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA,

Respondent.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

BRADFORD SWING
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
150 West Flagler Street
Suite 2200, Museum Tower
Miami, Florida 33130
Phone: (305) 789-3200
Fax: (305) 789-3395

Counsel of Record for Respondent Air Line Pilots Association, International

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should exercise certiorari jurisdiction to review the Eleventh Circuit Court of Appeals' denial of Petitioner's petition for writ of mandamus seeking review of the District Court's denial of a motion for summary judgment in a case that is still pending.

2. Whether this Court should exercise certiorari jurisdiction to review the Eleventh Circuit Court of Appeals' November 1992, Order dismissing Petitioner's untimely appeal of an uncertified, non-final order.

LIST OF PARTIES

Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots

Eastern Airlines, Inc., as administrator of the Plan

Pension Benefit Guaranty Corporation

Eastern Airlines Retirement Board a/k/a Pension Dispute Board

Air Line Pilots Association, International

Travelers Insurance Corporation

Alan C. Gibson*

William R. Tegtman*

Jack N. Mogus*

Charles Copeland*

Honorable K. Michael Moore

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* Individual members of the Pension Dispute Board who have been dismissed with prejudice from the underlying action.

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DANIEL G. GELLERT,

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v.

UNITED STATES DISTRICT COURT
for the SOUTHERN DISTRICT OF
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

CITATION OF OPINIONS AND JUDGMENTS BELOW

1. Gellert v. Eastern Airlines Fixed Benefit Retirement Income Plan for Pilots, U.S.C.A. 11th Circuit, Case No. 92-4091, Order of Dismissal, filed November 20, 1992.

2. In re Daniel G. Gellert, U.S.C.A. 11th Circuit, Case No. 93-4928, Denial of Application for Writ of Mandamus, filed February 23, 1994.

3. In re Daniel G. Gellert, U.S.C.A. 11th Circuit, Case No. 93-4928, Denial of "Petitioner's Suggestion of Rehearing In BANC," filed July 8, 1994.

Theses orders are attached to the Petition as Exhibits A, D, and E, respectively.

STATUTES OR OTHER PROVISIONS INVOLVED

28 U.S.C. § 1254(1)

28 U.S.C. § 1651(a)

Supreme Court Rules 10 and 13

STATEMENT OF THE CASE

Petitioner brought a two count complaint in the United States District Court for the Southern District of Florida. Count I of the Amended Complaint sought to overturn the decision of the Eastern Airlines Pilots Retirement Board a/k/a Pension Dispute Board ("PDB"), which denied Petitioner's claim for a disability retirement pension. Petitioner sued both the PBD and the individual members of the PDB, including Charles Copeland and Jack Mogus, the PDB members appointed by the Air Line Pilots Association, International ("ALPA"). Petitioner's claim allegedly arose under the Employee Retirement Income Security Act of 1974 ("ERISA"). Count II alleged failure to disclose certain information relating to the retirement plan required by ERISA.

On January 10, 1992, the district court dismissed Count I of the Amended Complaint with prejudice. On January 10, 1992, the court also dismissed Copeland and Mogus as defendants with prejudice on immunity grounds. Count II remained pending.

Petitioner appealed the order of dismissal to the United States Court of Appeal, Eleventh Circuit, Case No. 92-4091. On November 20, 1992, the Court of Appeals dismissed Petitioner's appeal because the order of dismissal was not a final order and because the district court did not make the express determination that there was no just reason for delay in the entry of judgment, as required by Rule 54(b) of the Federal Rules of Civil Procedure. Petitioner then proceeded to file successive amended complaints in the district court, greatly expanding the scope of his lawsuit and

adding new parties, including ALPA. Defendants in the district court (Respondents herein) moved to strike the various complaints. While such motions to strike were pending and before the district court had granted leave to amend the complaints, Petitioner filed numerous motions for summary judgment. In its Omnibus Order on Pending Motions, filed September 13, 1993, the district court ordered stricken all of Petitioner's complaints, save his Fourth Amended Complaint, and denied Petitioner's various motions for summary judgment. The district court's order permitted Petitioner to file appropriate substantive motions for summary judgment after the completion of discovery and with leave of court. After entry of the September 13, 1993, Omnibus Order, but prior to the completion of discovery and without leave of court, Petitioner filed additional motions for summary judgment. In its Omnibus Order, filed April 14, 1994, the district court denied Petitioner's additional motions for summary judgment for failure to comply with its previous order. The matter is still pending before the district court, the defendants below having responded to Petitioner's Fourth Amended Complaint and filed several dispositive motions.

Petitioner filed an Application and Petition for Writ of Mandamus with the Eleventh Circuit Court of Appeals, Case No. 93-4928. Petitioner sought to have summary judgment entered in his favor. In an Order filed February 23, 1994, the Court of Appeals denied Petitioner's application for writ of mandamus because Petitioner will have an adequate remedy by appeal upon completion of the case. Petitioner thereafter filed a "Suggestion of Rehearing In Banc," asserting that the district court judge denied

Petitioner a "fair and impartial resolution of this otherwise good cause of action" and, without further elaboration, also asserted that the defendants below are "taking unlawful advantage of the district court's personal criminal legal problems."[1/] In an Order filed July 8, 1994, the Court of Appeals denied Petitioner's "Suggestion of Rehearing In Banc," which the Court of Appeals treated as a motion for reconsideration. The instant petition followed.

ARGUMENT

(i) Denial Of Writ Of Mandamus In Case No. 93-4928

Rule 10 of the Supreme Court Rules provides that a petition for writ of certiorari will be granted only when there are special and important reasons therefor. This case presents neither special nor important circumstances, and the factors set forth in Rule 10 are wholly absent.

As set forth above, this matter is still pending before the district court and no legal issues are raised that cannot

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[1/]Despite Petitioner's scandolous accusations against the district court judge, Petitioner has failed to file a motion to recuse the judge, precluding the instant allegations. Further, any such motion would undoubtedly be improper, given Petitioner's, unsupported, irrational, and tenuous claims. See Giles v. Garwood, 853 F.2d 876 (11th Cir.), cert. denied, 489 U.S. 1030 (1989). In any event, the investigation of alleged wrongdoings by the district court judge was closed without any finding of wrongdoing.

wait for review on appeal. See Pacific Union Conference of Seventh-Day Adventists v. Marshall, 434 U.S. 1305 (1977).

The Eleventh Circuit's denial of Petitioner's application for a writ of mandamus because Petitioner has an adequate remedy by appeal (Exhibit D to Petitioner's Petition For Certiorari) is wholly consistent with other decisions of this Court as well. In Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953), this Court concluded that the supplementary review power conferred by the All Writs Act (28 U.S.C. § 1651(a)) is meant to be used in the exceptional case where there is clear abuse of discretion or usurpation of judicial power. The Court further stated that extraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial. Id. at 383. Yet, this is exactly what Petitioner seeks -- to circumvent the appeals process to review the district court's non-final orders denying summary judgment. The Eleventh Circuit recognized that Petitioner has an adequate remedy by appeal and properly denied the application for a writ of mandamus. See Plekowski v. Ralston-Purina Co., 557 F.2d 1218 (5th Cir. 1977). There thus is no basis for granting of certiorari, and doing so would circumvent the appellate process established by Congress and this Court.

(ii) The Eleventh Circuit's Dismissal Of Appeal No. 92-4091

The petition with respect to the Eleventh Circuit's dismissal of Appeal No. 92-4091, challenging the district court's dismissal of Count I of the Amended Complaint and Mogus and Copeland, is untimely. The Court of Appeals filed its Order of Dismissal on November 20, 1992, well

outside Supreme Court Rule 13's ninety-day limitations period.

CONCLUSION

The Court should deny the Petition because it seeks review of non-final orders, totally circumventing the appellate process, and because Petitioner seeks certiorari jurisdiction to challenge a Court of Appeals order filed in November 1992, well outside the ninety-day time frame for petitions for writ of certiorari.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Counsel for Petitioner
Air Line Pilots Association,
International
150 West Flagler Street
Suite 2200, Museum Tower
Miami, Florida 33130
Phone: (305) 789-3200
Fax: (305) 789-3395